

ISSUE DATE: July 5, 1995

DOCKET NOS. P-3163/CI-93-1332

ORDER TERMINATING INVESTIGATION AND CLOSING DOCKET

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm  
Tom Burton  
Joel Jacobs  
Marshall Johnson  
Dee Knaak

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of a Commission Initiated  
Investigation into the Status of University  
Technologies With Respect to the Resale of  
CENTRON Services

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**PROCEDURAL HISTORY**

On January 11, 1994, the Commission issued its ORDER APPROVING TARIFF in Docket No. P-999/CI-90-235. In the course of that docket, U S West Communications, Inc. (USWC) had requested direction from the Commission on the further provision of CENTRON to Downtown Telecom and University Technologies (now UTEC Associates or UTEC), customers that USWC had identified as possibly reselling CENTRON to third parties without authority to do so. As part of its January 11, 1994 Order, the Commission directed USWC to continue serving Downtown and UTEC until it had further opportunity to investigate the matter.

On January 14, 1994, the Commission issued Orders to Show Cause to Downtown and UTEC requiring both companies to present arguments to establish why the Commission should not direct USWC to terminate CENTRON service to them and/or take other remedial action.<sup>1</sup>

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<sup>1</sup> Downtown's reply was addressed in Docket No. P-3162/CI-93-1331. See In the Matter of a Commission Initiated Investigation into the Status of Downtown Telecom With Respect to the Resale of CENTRON Services, Docket No. P-3162/CI-93-1331, ORDER TERMINATING INVESTIGATION AND CLOSING DOCKET (July 20, 1994).

On March 4 and May 2, 1994, UTEC filed responses to the Commission's ORDER TO SHOW CAUSE.

On November 8, 1994, the Minnesota Department of Public Service (the Department) filed its comments.

On June 20, 1995, the Commission met to consider this matter.

## **FINDINGS AND CONCLUSIONS**

### **A. UTEC's Position**

UTEC denied that it was a telephone company or telecommunications carrier as those terms are defined in Minn. Stat. § 237.01 (1994). The Company argued, therefore, that the holding of the January 19, 1993 Order (that resellers of telephone service via CENTRON needed to procure a certificate of authority) did not apply to it. In support of its claim, the Company asserted that it did not furnish telephone service to the general public but only to its tenants in one building.

In addition, UTEC noted that the CENTRON system had been in place for many years before the January 19, 1993 Order. The Company stated that it had not received a copy of the 1993 Order and was unaware of the 1993 Order prior to receiving the ORDER TO SHOW CAUSE. The Company indicated that USWC was primarily responsible for UTEC's resale of CENTRON. UTEC emphasized USWC's awareness of UTEC's resale of CENTRON to its [UTEC's] tenants throughout the time period in question (1986 to present) and stated that USWC had identified CENTRON as the appropriate system for UTEC.

In response to the prospect of its telephone service being terminated for lack of a certificate of authority, UTEC noted that any interruption of its system as it is now run could be very detrimental to its small business tenants, whose businesses could be affected by each phone call it received or missed.

Finally, UTEC stated that it would do whatever the Commission deemed appropriate, in these circumstances, including applying for a certificate of authority, but asked that it not be penalized for contracting with USWC for what had appeared to be a proper use of CENTRON service.<sup>2</sup>

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<sup>2</sup> Subsequent to its response to the ORDER TO SHOW CAUSE, the Company did, in fact, file an application for a certificate of authority to resell CENTRON service and two other telephone services: long distance and directory assistance. That application was received December 15, 1994 and handled in Docket No. P-5130/NA-94-1159. A Commission Order granting the requested authority has been issued concurrently with the present Order.

## **B. The Department's Comments**

The Department did not respond directly to UTEC's objection that it [UTEC] did not furnish telephone service to the public. Instead, the Department focused its analysis on the certification requirements of Minn. Stat. § 237.16, subd. 4 (1994). The Department noted that, among other things, the statute prohibits a company from *operating* or *controlling* any telephone system without first obtaining from the Commission a determination that the present or future public convenience and necessity require it. The Department then cited the Commission's finding at page 7 of its January 19, 1993 Order in Docket No. P-999/CI-90-235:

...the [CENTRON] reseller clearly "controls" and "operates" a telephone "system" within the meaning of Minn. Stat. § 237.16, subd. 4.

The Department argued, therefore, that pursuant to the January 19, 1993 Order it is not necessary for a firm to offer service to *all* members of the public in order to be classified as regulated reseller of CENTRON service. The Department stated that, based on UTEC's responses to the ORDER TO SHOW CAUSE, the Company was operating in a similar fashion to that of other CENTRON resellers such as Downtown Telecom and Enhanced Telemanagement, Inc. to whom the Commission had issued certificates of authority to resell CENTRON pursuant to Minn. Stat. § 237.16. The Department found nothing in UTEC's responses to justify different regulatory treatment for UTEC.

The Department recommended, therefore, that the Commission find that UTEC is operating as a telephone company pursuant to Minn. Stat. § 237.16 (1994) and order UTEC to file an application for authority to resell CENTRON service within 45 days of the Commission's Order.<sup>3</sup> The Department further recommended that the Commission direct USWC to terminate CENTRON service to UTEC if the Company did not file the application.

Regarding any penalty for uncertificated (hence unlawful) provision of telephone service, the Department stated that none was warranted. The Department stated that there is no indication of harm to the public or bad faith on the part of the Company with respect to compliance with the certification requirements of Minn. Stat. § 237.16.

The Department stated that based on available information it appeared that UTEC was not fully informed of the requirement that it receive a certificate of authority for resale of CENTRON service.

## **C. Commission Analysis and Action**

### **1. UTEC Furnished Telephone Service to the Public Without Authority**

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<sup>3</sup> When the Department filed its comments, UTEC had not yet filed its application for a certificate of authority to resell CENTRON service.

UTEC has operated a small business incubator in a former school building since 1986. Among the services provided by UTEC to its business tenants is the resale of CENTRON telephone lines.

UTEC asserted that it did not provide telephone service "to the public" and therefore it was not a telephone company or telecommunications carrier as defined in Minn. Stat. § 237.01. Since the Company acknowledged providing telephone service to tenants in its building, the basic question posed in this matter is whether service to this limited group constituted "service to the public" within the meaning of the statute. The Commission finds that it does.

The Commission has addressed this question and rejected the Company's argument in previous Orders. In an Order dated December 19, 1989 in the private shared tenant services (PSTS) rulemaking docket ( P-999/R-88-357), the Commission noted that some providers of telephone service who were participating in that proceeding argued that they were not subject to regulation by the Commission as "telephone companies" because they do not provide telephone service "to the public".<sup>4</sup>

In its analysis, the Commission observed that in Northern Natural Gas Company v. Minnesota Public Service Commission, 292 N.W.2d 759 (1980), the Minnesota Supreme Court interpreted the phrase "to or for the public" to include provision of service to even a small class of customers who had no enforceable right to demand services. The Commission also noted that the Minnesota Court of Appeals rejected Northwestern Bell's contention that it was not providing service "to the public" when it provided telephone service to "large" companies. The Commission quoted the Minnesota Court of Appeals as follows:

NWB argues that ... since NWB provides its services to large subscribers (OLECs), its service is not "to the public" as is required by the statute. We cannot conclude, however, that the size of the subscribers establishes the actual character of the service by NWB. Northwestern Bell Telephone Company v. Minnesota Public Utilities Commission, 420 N.W.2d 646, 649 (Minn.App.1988).

The Commission also referred to PW Ventures, Inc. v. Katie Nichols, Chairman of the Florida Public Service Commission, et al., 533 So.2d 281 (Fla. 1988) in which the Florida Supreme Court held that sale of electricity to even a single customer was sale of electricity "to the public" which subjected the seller to regulation by the Florida Public Service Commission as a "public utility." PW Ventures, supra at 282.

The Commission stated:

In determining whether a provider of telephone service is a "telephone company" as defined in Minn. Stat. § 237.01, the Commission applies the analysis adopted by the Minnesota Supreme Court in Northern Natural Gas Company v. Minnesota

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<sup>4</sup> See In the Matter of a Rulemaking by the Minnesota Public Utilities Commission Governing Resale and Sharing of Local Telephone Service, Docket No. P-999/R-88-357, ORDER (December 19, 1989) pages 3-4.

Public Service Commission, supra at 764. In Northern, the Minnesota Supreme Court held that in the absence of a showing that an entity falls within an exception listed in the statutory definition of "public utility," an entity that furnishes natural gas at retail to *direct sale customers* is a public utility. Northern Natural Gas Company, supra at 764. (Emphasis added.)

Based on this analysis, it is clear that UTEC provided and provides telephone service "to the public"<sup>5</sup> as that term is used in the definitions of telephone company and telecommunications carrier in Subdivisions 2 and 6, respectively, of Minn. Stat. § 237.01. UTEC does not meet a further qualification for *telecommunications carrier*, however, because it provides local exchange service (resold CENTRON and directory assistance) to its customers.

Telephone companies are required by Minn. Stat. § 237.16, subd. 1 to obtain a certificate of authority from the Commission before operating in Minnesota. The only exception to the certification requirement for telephone companies is if the company qualifies as a provider of private shared telecommunications service (PSTS) as defined in Minn. Stat. § 237.68 (1994). However, UTEC does not qualify for PSTS provider status because it provides telephone service to its tenants using CENTRON and, as the Commission found in its January 19, 1993 Order in Docket No. P-999/CI-90-235, only PBX technology meets the statutory requirements for PSTS as defined in Minn. Stat. § 237.68, subd. 1.

Accordingly, having not secured a certificate of authority to resell CENTRON pursuant to Minn. Stat. § 237.16, it is clear that from the time it began providing telephone service to its tenants using the CENTRON system in 1986 to the present, UTEC has acted without authority to do so.

## **2. No Penalties are Warranted Under the Circumstances**

UTEC describes itself as having no inkling, prior to receipt of the ORDER TO SHOW CAUSE, that its activity with respect to telecommunications service to its tenants was in any way implicated with regulation. In fact, as indicated above, UTEC's role with respect to telecommunications service within its building has been that of a *telephone company* under Minnesota statutes, with all the responsibilities attendant thereto. However, having no previous acquaintance with the telecommunications industry and its regulation, UTEC would naturally rely

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<sup>5</sup> See also In the Matter of Firstcom, Inc.'s Request for a Certificate of Authority to Resell Long Distance Services in Minnesota, Docket No. P-3146/NA-93-1026 and In the Matter of Firstcom, Inc.'s Request for a Certificate of Authority to Resell Local Exchange Telephone Services, Docket No. P-3146/M-93-1084, ORDER GRANTING AUTHORITY TO RESELL LONG DISTANCE SERVICE IN MINNESOTA AND USWC'S CENTRON SERVICE IN USWC'S EXCHANGES (July 20, 1994). In that Order, the Commission found that even if Downtown and Firstcom had been PSTS providers (providing service only to tenants in their building) they were also *telephone companies* as defined in Minn. Stat. § 237.01, subd. 1 (1992) because they furnish telephone service *to the public*. The Commission stated that it had "never found to the contrary". Order at page 6.

on information and impressions conveyed by the party it knew to be sophisticated in these matters, USWC.

UTEC's explanation, therefore, that it relied heavily on USWC's guidance in 1) selecting CENTRON as the method for furnishing telephone service to its tenants and 2) believing in the lawfulness of its activity, is convincing. Especially in 1986 when the relationship began between UTEC and USWC, it is natural that UTEC would view USWC as "the telephone company" and itself as simply the customer of the telephone company.

In addition, the Commission finds that once UTEC was apprised of the regulatory issues involved, it responded promptly and cooperated fully in the investigation of this matter. Further, the Company has indicated a willingness to do whatever the Commission deems appropriate in these circumstances and has, in fact, filed an appropriate application for a certificate of authority which is granted this day in a separate Order. The Commission trusts that the Company will be mindful of its ongoing responsibilities as a certificated Minnesota telephone company.

Under these circumstances, the Commission will terminate its investigation of this matter without seeking penalties for the years UTEC provided telephone service to its tenants without authority.

### **ORDER**

1. The investigation initiated to determine the status of University Technologies with respect to the resale of CENTRON Services is terminated. No further action in this docket is warranted. The docket, P-3163/CI-93-1332, is hereby closed.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)